

1 Michael P. O'Bresly SBN 165512
2 LAW OFFICE OF MICHAEL P. O'BRESLY
3 1300 Clay Street, 11th Floor
4 Oakland, California 94612
5 Tel: (510) 350-8332
6 Fax: (510) 255-2600

7 Attorney for Plaintiff
8 THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

11 THE REGENTS OF THE
12 UNIVERSITY OF CALIFORNIA,

13 Plaintiff,

14 vs.

15 INDEMNITY INSURANCE
16 COMPANY OF NORTH AMERICA,
17 DOES 1 TO 20,

18 Defendants.

) Case No.: C 07 2721 PJH

) PLAINTIFF'S MEMORANDUM OF
) POINTS AND AUTHORITIES IN
) REPLY TO OPPOSITION TO
) MOTION TO REMAND ACTION TO
) STATE COURT

) **Hearing Date: August 15, 2007**

) **Time: 9:00 a.m.**

) **Courtroom: 3**

) **Assigned to the Honorable Phyllis J.
) Hamilton**

19
20
21 **I. INDEMNITY HAS NOT DEMONSTRATED THAT THIS COURT
22 HAS JURISDICTION OVER THIS MATTER.**

23 As the cases cited in the Regents' motion indicate, the party seeking to
24 invoke the jurisdiction of the federal courts must demonstrate the basis for that
25

jurisdiction. Here, in opposition to the Regents' motion to remand, Indemnity has not met that burden, and the matter should therefore be remanded to state court.

II. THE REGENTS IS NOT DIRECTLY INVOKING THE 11TH AMENDMENT AS AN IMMUNITY TO REMOVAL

Indemnity sets up a straw man in citing to California ex rel. Lockyer v. Dynege, Inc. (9th Cir. 2004) 375 F. 3d 831, and similar cases. The issue here is not whether the 11th Amendment provides the Regents with an immunity to this court's otherwise valid assumption of jurisdiction over this case, as was raised by the State of California in Dynege and by the State of Mississippi in In re: Rezulin Prod. Liab. Litig. (S. D. N. Y. 2001) 133 F. Supp. 2d 272. The issue here is whether the Regents is the alter ego of the State of California and therefore not a "citizen" for purposes of the diversity statute, i.e., whether there exists a valid basis in the United States Code by which this court may assert jurisdiction. This is a subtle yet highly important distinction.

The Regents has argued that the reasoning of the 11th Amendment cases provides the analytical framework for answering the question here, as has been held by the Fourth, Fifth and Eleventh Circuits in the cases cited in the motion (see Regents' Motion at pp. 5 – 7). States and their instrumentalities are not "citizens," whether plaintiff or defendant.

As Indemnity concedes in its opposition memorandum, the case of Regents of the University of California v. Eli Lilly & Co. (1997) 119 F. 3d 1559 involved a very different procedural posture than is presented here. Among other dissimilarities, that case involved a federal question (enforcement of patent rights).

1 Here, there is no federal question raised by the Complaint to serve as a basis for
2 jurisdiction.

3 **III. NOTWITHSTANDING INDEMNITY’S ARGUMENTS, THE**
4 **REGENTS IS AN “ARM” OF THE STATE.**

5 In its opposition, Indemnity cites University of Rhode Island v. A. W.
6 Chesterton Co. (D. R. I. 1989) 721 F. Supp. 400. Whatever that University’s
7 relation to the state of Rhode Island, the case begins with the proposition advanced
8 by Regents, which is that “the ‘alter ego’ test employed in Eleventh Amendment
9 cases is ‘pretty much the same’ as that employed for the purpose of determining
10 diversity jurisdiction.” 721 F. Supp. at 401 (citations omitted) Since the Regents
11 has been held to be an “arm” or “alter ego” of the State of California for purposes
12 of the 11th Amendment, the same reasoning compels the conclusion that it is the
13 “arm” or “alter ego” for purpose of the diversity statute.

14 Indemnity cites a quote from Vaughn v. Regents of University of California
15 (N. D. Ca. 1981) 504 F. Supp. 1349, that “each University must be evaluated under
16 its own circumstances.” That does not change the fact that the circumstances of
17 this particular University have been evaluated, and it has been found to be an
18 “arm” of the State. The Vaughn decision considered all of the same evidence
19 relied on by Indemnity, including the Regents’ power to issue revenue bonds for
20 certain purposes.¹ Two important factors to that decision were that the Regents
21 performs an essential state government function and that awards against the
22 Regents would ultimately be satisfied from “state funds” (which does necessarily
23

24 ¹ All of the Cal. Educ. Code Sections cited by Indemnity at p. 5 of its opposition appear to come from the Chapter
25 permitting the Regents to issue revenue bonds, known as the University of California Revenue Bond Act of 1947.
By definition, revenue bonds are repaid by funds generated from the specific project being funded with the debt.
The Regents has no information to indicate that the road project at issue was funded by revenue bonds.

mean money literally taken out of the state treasury). 504 F. Supp. at 1354, and fn. 5. For example, as detailed in the Vaughn decision, the University of California has “first claim” on state funds under the state constitution, 504 F. Supp. at 1354, fn. 6.² Although several factors may be relevant, as indicated in the cited footnote from Regents of the University of California v. Doe (1997) 519 U. S. 425, the Supreme Court also made clear that it was of “considerable importance” that the State of California would be “legally and practically” responsible for the money at issue in that case. Doe, supra, 519 U. S. at 430. This was also a factor which the Vaughn court emphasized.³ “When indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being [i.e., states’ potentially being held liable for debts by federal courts, and respect for states’ sovereignty] remain our prime guide.” Hess v. Port Authority Trans-Hudson Corp. (1994) 513 U. S. 30, 50.

Importantly, since the Vaughn case, the Ninth Circuit has held in other published decisions that the Regents is an “instrumentality” of the state for purposes of the 11th Amendment. E.g., Thompson v. City of Los Angeles (9th Cir. 1989) 885 F.2d 1439, 1443 (“It has long been established that UC is an instrumentality of the state for purposes of the Eleventh Amendment”); BV Engineering v. Univ. of Calif., Los Angeles (9th Cir. 1988) 858 F.2d 1394, 1395, cert. denied, 489 U.S. 1090 (1989).

² In the 2006-07 general budget, the state committed \$3.1 billion to the University of California system. See Section III of “Major Features of the 2006 California Budget,” Legislative Analyst’s Office (July 2006), found at http://www.lao.ca.gov/2006/major_features/major_features_2006.html.

³ It is ironic that Indemnity relies on the Doe decision, since in that case the United States Supreme Court rejected the argument that the State’s funds were not at risk because a third party, the Department of Energy, would purportedly indemnify the Regents for any adverse judgment. Here, the question is whether Indemnity has an obligation to indemnify Regents for the property damage under the insurance policy at issue. If this court rules against the Regents’ claim, it will have an impact on “state funds.” See Regents’ Motion at 6:9 to 7:4.

1
2 For these reasons, the Court is requested to order that this matter be
3 remanded.

4
5 DATED: August 1, 2007

Respectfully submitted,

6
7 REGENTS OF THE UNIVERSITY
8 OF CALIFORNIA

9 By: /s/ Michael P. O'Bresly
10 Michael P. O'Bresly
11 Its Counsel
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF SERVICE

I, Michael P. O'Bresly, hereby certify that on this the 1st day of August, 2007, at approximately 4:50 p.m., I caused a true copy of this document, Regents' Memorandum in Reply to Opposition to Motion to Remand, to be transmitted to counsel of record for the defendant Indemnity Insurance Company of America Inc. via electronic mail.

Dated: July 11, 2007

/S/ Michael P. O'Bresly